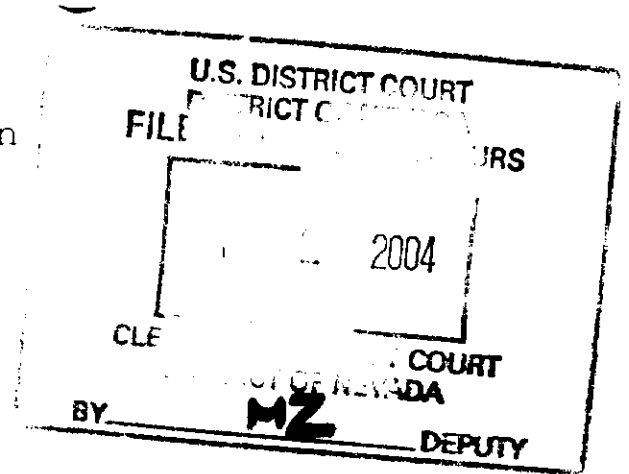


**ORIGINAL**

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UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA

-----X Docket #: CV-S-04-1365-LRH-LRL  
 JUAN CARMONA MORALES, individually,  
 and on behalf of all others similarly  
 situated,

Plaintiffs,

-against-

ALLIED BUILDING CRAFTS, INC., GYPSUM  
 CONSTRUCTION, INC., GYPSUM CONSTRUCTION  
 WEST, INC., ALLIED CONSTRUCTION CRAFTS,  
 INC., S.W. BUILDING CRAFTS, SEAN MICHAEL  
 CAVANAUGH, and "John Does", name fictitious,  
 actual name and number of such persons  
 being unknown,

Defendants.

-----X

**PLAINTIFF'S MOTION FOR CIRCULATION OF NOTICE  
 OF THE PENDENCY OF THIS ACTION PURSUANT TO  
 29 U.S.C. § 216(B) AND FOR OTHER RELIEF**

Pursuant to 29 U.S.C. § 216(b) the plaintiff, Juan Carmona Morales, through his attorney, Leon Greenberg, Esq., hereby moves this Court for an Order directing that other persons similarly situated to the plaintiff Juan Carmona Morales be given notice of the pendency of this action and an opportunity to file written consents with this Court to join this action as party plaintiffs and for other associated relief including a toll of the statute of limitations otherwise applicable to such persons' claims for the period of time that this motion is pending before the Court.

Plaintiff's motion is made and based upon the certification

1 of plaintiff Juan Carmona Morales and the memorandum of points  
2 and authorities submitted with this motion and the other papers  
3 and pleadings in this action.

4 Dated: Clark County, Nevada  
5 November 20, 2004

6 Respectfully submitted,

7 

8 Leon Greenberg, Esq.  
9 LEON GREENBERG PROFESSIONAL CORPORATION  
10 Attorney for the Plaintiff  
11 633 South 4<sup>th</sup> Street - Suite 9  
12 Las Vegas, Nevada 89101  
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14 Nevada Bar Number: 8094

15 TO:

16 Littler Mendelson  
17 Attorneys At Law  
18 3960 Howard Hughes Parkway - Suite 300  
19 Las Vegas, Nevada 89109-0920  
20 Attention: Rick D. Roskelley, Esq.  
21  
22  
23  
24  
25  
26  
27

**MEMORANDUM OF POINTS AND AUTHORITIES****PRELIMINARY STATEMENT**

Plaintiff submits this memorandum of points and authorities in support of his motion to advise persons similarly situated to the plaintiff of the pendency of this action pursuant to 29 U.S.C. § 216(b) ("§ 216(b)") and toll the statute of limitations for such persons to join this action while this motion is pending. This action is brought under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (the "FLSA") for unpaid overtime wages (Exhibit "A", Complaint, First Claim for Relief). Plaintiff is also making certain related claims under Nevada Law involving violations of Nevada's wage payment statutes and for breach of contract and tortious interference with contract (Complaint, Second through Fourth Claims for Relief).

**PROCEDURAL POSTURE OF THIS CASE****The Court is Being Asked to Assist  
Other Persons in Becoming "Opt In"  
Plaintiffs Pursuant to § 216(b)**

This litigation is brought as an "opt in" representative action under § 216(b) in respect to the FLSA claims and an F.R.C.P. § 23 ("Rule 23") "opt out" class action in respect to the Nevada State law claims. The "opt in" procedure of § 216(b) prohibits any person from being a plaintiff in an FLSA action unless they file a written consent with the Court. A Rule 23 class action certification of the Nevada State Law claims would bind all persons with such State Law claims unless they "opt out" of this litigation. These different procedural approaches are

1 not antagonistic and can be harmonized in a complementary  
2 fashion. See, Ansoumana v. Gristede's Operating Corp., 201  
3 F.R.D. 81 (S.D.N.Y. 2001), Brzychnalski v. Unesco, Inc., 35 F.  
4 Supp. 2d 351 (S.D.N.Y. 1999), Beltran-Benitez v. Sea Safari, 180  
5 F. Supp. 2d 772 (E.D.N.C. 2001) and the majority of Court  
6 decisions that have examined this issue.

7 Plaintiff's counsel believes the facts of this case will  
8 ultimately compel Rule 23 class certification of the Nevada State  
9 Law claims but it makes no request for class certification at  
10 this time. The Court will require a detailed factual record to  
11 consider such a class certification request and no discovery has  
12 been conducted in this case. This motion only requests the  
13 circulation of notice of the pendency of this action to other  
14 persons pursuant to § 216(b) so that they can "opt in" to this  
15 litigation under the FLSA. As discussed, infra, an Order  
16 directing the circulation of such notice can, and should, be  
17 granted at this time and upon the record presented with this  
18 motion.

19 The reason an immediate FLSA § 216(b) "opt in" notice is  
20 appropriate, while a Rule 23 class certification Order is not,  
21 stems from the different processes used by § 216(b) and Rule 23.  
22 Under § 216(b) no person is bound by, or benefits from, an FLSA  
23 litigation unless they "opt in" by filing a written consent with  
24 the Court, and the statute of limitations on such person's FLSA  
25 claim continues to run until they file a consent. Under Rule 23  
26 all persons, except those who "opt out", are bound by the  
27

1 litigation (to their benefit or their detriment) and the statute  
2 of limitations is tolled once the representative plaintiff files  
3 the litigation. Rule 23 class actions, because they affect many  
4 persons who have made no affirmative choice to join the  
5 litigation (they have simply failed to "opt out") require close  
6 judicial scrutiny and procedural safeguards to protect such  
7 "silent" participants' interests. FLSA actions under § 216(b) do  
8 not present the same concerns. FLSA plaintiffs make an  
9 affirmative and conscious choice to "opt in" and join the  
10 litigation and there are no "silent" FLSA participants whose  
11 interest need to be protected by the Court. The lack of a class  
12 wide toll of the statute of limitations in FLSA cases should also  
13 cause the Court to militate towards providing notice to other  
14 persons of their "opt in" rights at the earliest stage of the  
15 litigation. Failing to provide such prompt notice frustrates the  
16 FLSA's broad remedial purposes and its specific grant of  
17 collective action rights to employees.

18 The Courts Have Fashioned Notice Procedures In FLSA Cases

19 The FLSA is silent on how notification should be given to  
20 other similarly situated persons in § 216(b) collective actions.  
21 Braunstein v. Eastern Photographic Laboratories, Inc., 600 F.2d  
22 335, 336 (2nd Cir. 1978), was the most notable early Circuit  
23 Court decision approving a District Court Order directing written  
24 notice to similarly situated persons in a § 216(b) lawsuit.  
25 Braunstein was endorsed by Hoffmann-La Roche, Inc. v. Sperling,  
26 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989),  
27

1 defendants would require its workers to complete their  
2 assignments within certain specified budgets, and if they failed  
3 to do so the workers would be required to keep working without  
4 receiving any additional compensation. This resulted in the  
5 defendants' employees working at least 45 hours a week but only  
6 being paid for 40 hours a week. The plaintiff and defendants'  
7 other employees were denied at least 5 hours of overtime pay  
8 (time and one-half pay as required by the FLSA) each week. In  
9 addition, the defendants would sometimes work employees six days  
10 during the week but only pay its employees for five days, or 40  
11 hours of work (the employer would then give the employees an  
12 additional paid holiday the following week, the use of such "paid  
13 leave time" in lieu of overtime pay is not authorized by the  
14 FLSA).

#### 15 **ARGUMENT**

##### 16 **POINT I.**

##### 17 **NOTICE OF THE PENDENCY OF THIS ACTION SHOULD BE GIVEN**

18 Whether other potential FLSA plaintiffs should receive  
19 notice that an FLSA action is pending, and of their right to join  
20 such an action, involves a single issue: "Whether the other  
21 members of the proposed collective action are 'similarly  
22 situated.'" Foster v. The Food Emporium, 2000 W.L. 1737858, 2000  
23 U.S. Dist. LEXIS 6053, J. McMahon, (S.D.N.Y. 2000), citing  
24 Hoffman v. Sbarro, Inc., 982 F. Supp 249 (S.D.N.Y. 1997). The  
25 issues considered on a Rule 23 motion for class certification,  
26 such as numerosity, typicality, commonality and  
27

1 representativeness, are not considered on a motion to circulate  
 2 notice of the pendency of an FLSA action. Id.

3 The case of Kumar Realite v. Ark Restaurants Corp., 7  
 4 F.Supp. 2d. 303, 306 (S.D.N.Y. 1998), contains one of the most  
 5 extensive discussions of the standard that Courts should use when  
 6 considering motions to give notice of an FLSA lawsuit.  
 7 Plaintiff's counsel refers at length to the decision in Kumar  
 8 Realite which accurately summarizes the controlling law and the  
 9 issues before the Court:

10 The threshold issue in deciding whether to authorize  
 11 class notice in an FLSA action is whether plaintiffs have  
 12 demonstrated that potential class members are "similarly  
 13 situated." See, 29 U.S.C. § 216(b). Neither the FLSA nor  
 14 its implementing regulations define the term "similarly  
 15 situated." However, courts have held that plaintiffs can  
 16 meet this burden by making a modest factual showing  
 17 sufficient to demonstrate that they and potential plaintiffs  
 18 together were victims of a common policy or plan that  
 19 violated the law. See, Jackson v. New York Telephone Co.,  
 20 163 F.R.D. 429, 431 (S.D.N.Y.1995) (at the preliminary  
 21 notice stage, "plaintiffs are only required to demonstrate a  
 22 factual nexus that supports a finding that potential  
 23 plaintiffs were subjected to a common discriminatory  
 24 scheme"); Krueger v. New York Telephone Co., 1993 WL 276058  
 25 (S.D.N.Y. July 21, 1993) (when the litigation is in its  
 26 early stages, plaintiffs need only provide "some factual  
 27 basis from which the court can determine if similarly  
 situated plaintiffs exist"); Schwed v. General Electric Co.,  
 159 F.R.D. 373, 375-76 (N.D.N.Y.1995) ("plaintiffs need only  
 describe the potential class within reasonable limits and  
 provide some factual basis from which the court can  
 determine if similarly situated potential plaintiffs  
 exist"); Heagney v. European American Bank, 122 F.R.D. 125,  
 127 (E.D.N.Y.1988) (requiring "some identifiable factual  
 nexus which binds the named plaintiffs and potential class  
 members together as victims of a particular alleged  
 discrimination") (quoting Palmer v. Reader's Digest Ass'n,  
 42 Fair Empl. Prac. Cas. (BNA) 212, 1986 WL 11458  
 (S.D.N.Y.1986)).

Nor must this Court wait for defendant to complete its  
 discovery before authorizing class notice. To the contrary,  
 [so long as the "similarly situated" requirement has been



met], courts have endorsed the sending of notice early in the proceeding, as a means of facilitating the FLSA's broad remedial purpose and promoting efficient case management. See, Braunstein, 600 F.2d at 336 (notice to potential plaintiffs "comports with the broad remedial purpose of the Act, which should be given a liberal construction, as well as with the interest of the courts in avoiding multiplicity of suits"); Frank v. Capital Cities Communications, Inc., 88 F.R.D. 674, 676 (S.D.N.Y.1981) ("the experiences of other employees may well be probative of the existence vel non of a discriminatory practice, thereby affecting the merits of the plaintiffs' own claims"); Schwed, 159 F.R.D. at 375 ("[E]ven where later discovery proves the putative class members to be dissimilarly situated, notice ... prior to full discovery is appropriate as it may further the remedial purpose of the [FLSA]."), Cook v. United States, 109 F.R.D. 81, 83 (E.D.N.Y.1985) ("Certainly, it is 'unlikely that Congress, having created a procedure for representative action, would have wanted to prevent the class representative from notifying other members of the class that they had a champion.' ") (citation omitted); Krueger, 1993 WL 276058 at \*2 ("[E]ven if plaintiffs' claims turn out to be meritless or, in fact, all the plaintiffs turn out not to be similarly situated, notification at this stage, rather than after further discovery, may enable more efficient resolution of the underlying issues in this case.").

The only published decision by this Court discussing this issue was Judge Pro's decision in Bonilla v. Las Vegas Cigar Company, 61 F. Supp. 2d 1129 at 1139 n.6 (D. Nev. 1999). Although Judge Pro did not cite Kumar Realite, or discuss this issue at great length, he did find, as in Kumar Realite, that while plaintiffs bear the burden of proving that they are "similarly situated" this "is a lenient burden for plaintiffs to meet." See, Thiebes v. Wal-Mart, 1999 U.S. Dist. LEXIS 18649, p.8, 1999 U.S. Dist WL 1081357 (D. Or. 1999) and Ballaris v. Wacker Stiltttronic Corp., 2001 U.S. Dist. LEXIS 13354, p. 7, 2001 U.S. Dist. WL 1335809 (Bonilla recognized that a § 216(b) FLSA collective action is certified under a much more lenient "similarly situated" standard than that imposed by Rule 23).



Defendants will likely argue that Rule 23 controls § 216(b) FLSA collective actions by citing the distinctly minority view of some District Courts, most notably Shuashan v. University of Colorado, 132 F.R.D. 263 (D. Colo. 1990). This claim by defendants is without merit as the only Circuit Courts to examine this issue have rejected applying Rule 23 to § 216(b) collective actions. See, Thiessan v. General Electric Capital Corp., 267 F.3d 1095, 1105 (10<sup>th</sup> Cir. 2001) (Congress "clearly chose" to not have Rule 23 standards apply to § 216(b) actions) which overruled Shuashan<sup>1</sup> and Hipp v. Liberty National Life Ins. Co., 252 F.3d 1208, 1214 (11<sup>th</sup> Cir. 2001) (The "similarly situated" requirement of § 216(b) is "not particularly stringent" and implicitly rejecting a Rule 23 approach).

The potential plaintiffs in this case are "similarly situated" for FLSA purposes since they were all subject to the same improper "budget limitation" on their work which resulted in them working overtime hours without any additional compensation. A proposed Notice of Pendency is provided at Exhibit "C".

It is also suggested that it would better if the Court not involve itself with the precise form of notice that is given to the

---

<sup>1</sup> The District Courts since Shuashan have almost "unanimously shunned the Rule 23 standards" for § 216(b) cases. Cole and Bainer, *To Certify or Not to Certify: A Circuit-By-Circuit Primer on the Varying Standards for Class Certification in Actions Under the Fair Labor Standards Act*, 13 B.U. Pub. Int. L. J. 167, 172 (2004). See, also, Borgen and Ho, Litigation of Wage and Hour Collective Actions under the Fair Labor Standards Act 7 Empl. Rts. & Employ. Pol'y J. 129, 135 (2003) (Surveying decisions and finding that a "consensus" has been reached by the District Courts that § 216(b)'s "similarly situated standard does not incorporate Rule 23 requirements.")

1 potential plaintiffs. In Heagney v. European American Bank, 122  
2 F.R.D. 125, 130-131 (E.D.N.Y. 1988) the Court granted plaintiffs'  
3 counsel leave to circulate a notice of the litigation but declined  
4 to Order any particular form of notice. Plaintiff's counsel  
5 suggests that rather than the Court approving a particular form of  
6 notice, defendants should be Ordered to provide the names and last  
7 known addresses of the potential plaintiffs. Plaintiff's counsel  
8 would be granted leave to send a notification in written form, and  
9 through only one mailing to each person, about the pendency of this  
10 action.

11 The contents of plaintiff's counsel's notification about the  
12 pendency of this litigation would have to be truthful and disclosed  
13 to defendants. It would be in the form of a letter (not a legal  
14 document) and could not in any fashion imply that its contents was  
15 approved by the Court or that the Court has endorsed the merits of  
16 plaintiff's claims. It would also not be classified as an  
17 "advertisement" under Nevada's rules governing direct mail  
18 advertising by attorneys. The Nevada Rules of Professional Conduct  
19 § 197(4) require that all direct mail advertisements by attorneys  
20 be prominently marked on the outside as an "advertisement." This  
21 requirement encourages the receiver of such mail to not open it and  
22 throw it away as "junk mail." Imposing such a "marked as  
23 advertising" requirement on the FLSA notification in this case  
24 would run counter to the purpose of such notification, which is to  
25 effectively advise potential plaintiffs of this lawsuit and their  
26 right to participate in it.

1 **POINT II**

2 **THE COURT SHOULD GRANT AT LEAST A SIXTY DAY PERIOD FOR**  
3 **ADDITIONAL PLAINTIFFS TO JOIN THIS LITIGATION**

4 The Court may be reluctant to Order notification of this  
5 lawsuit to other potential plaintiffs without imposing some time  
6 limit on the joinder of additional plaintiffs. Plaintiff's counsel  
7 urges the Court to allow additional plaintiffs to join this  
8 litigation for at least sixty days after defendants provide the  
9 requested names and addresses to plaintiff's counsel. This time  
10 period is reasonable and should not delay the progress of this  
11 case. Plaintiff's counsel strongly believes that imposing a  
12 shorter time limit (such as thirty days) for persons to come  
13 forward and join this litigation would be unfair, as some potential  
14 plaintiffs may be traveling or away from home or involved in other  
15 matters and not able to respond to a written communication within  
16 such a short time span.

17 **POINT III**

18 **THE COURT SHOULD TOLL THE STATUTE OF LIMITATIONS IN THIS**  
19 **CASE FOR THE PERIOD OF TIME THAT THIS MOTION IS PENDING**

20 As already noted, under the FLSA the statute of limitations on  
21 each individual "opt in" plaintiff's claim continues to run until  
22 their consent to joinder is filed with the Court (there is no class  
23 wide toll as in Rule 23 class action). It would be unfair to the  
24 potential plaintiffs to allow their claims to diminish, or expire,  
25 while this Court considers plaintiff's motion.

26 While the Court cannot completely abrogate the statute of  
27 limitations scheme created by the FLSA, it does have the equitable

1 power to toll such statute of limitations in particular  
2 circumstances, including for the time period that the Court was  
3 considering a motion to provide notification to other potential  
4 plaintiffs. See, Partlow v. Jewish Orphans' Home of Southern  
5 California, Inc., 645 F.2d 757, 760 (9th Cir. 1981), abrogated on  
6 other grounds by Hoffman-LaRoche, supra. See, also, Owens v.  
7 Bethlehem Mines Corp., 630 F. Supp. 309, 312-13 (S.D. W.Va. 1986).

8 A toll of the statute of limitations while this motion is  
9 pending, and until the names and addresses of the potential  
10 plaintiffs are provided to plaintiff's counsel, makes excellent  
11 sense as a matter of judicial policy and fundamental fairness.  
12 Allowing the FLSA statute of limitations to run while this motion  
13 is pending rewards the defendants for their unsuccessful motion  
14 opposition. Denying a toll of the statute of limitations will  
15 cause defendants in other cases to meritlessly oppose FLSA notice  
16 of pendency requests to gain the collateral benefit of a continued  
17 running of the statute of limitations. The Court should not  
18 encourage or reward such conduct by these defendants or any other  
19 defendants. Granting the statute of limitations toll sought by the  
20 plaintiffs will to put them in the same position that they would  
21 have been if defendants had consented to the notice of pendency.  
22 Such a result is fair and equitable to all parties also deters  
23 defendants in FLSA cases from burdening the Court with unnecessary  
24 motions.

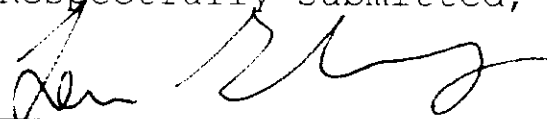
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**CONCLUSION**

For all the foregoing reasons plaintiff's motion should be granted in its entirety together with such other further and different relief that the Court deems proper.

Dated: Clark County, Nevada  
November 20, 2004

Respectfully submitted,



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Attorney for the Plaintiff  
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COPY

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CV-S-04-1365-LRH-LRL

4 UNITED STATES DISTRICT COURT  
5 DISTRICT OF NEVADA

6 JUAN CARMONA MORALES, Individually,  
7 and on behalf of all others similarly  
8 situated,

COMPLAINT

Plaintiffs,

-against-

9 ALLIED BUILDING CRAFTS, INC., GYPSUM  
10 CONSTRUCTION, INC., GYPSUM CONSTRUCTION  
11 WEST, INC., ALLIED CONSTRUCTION CRAFTS,  
12 INC., S.W. BUILDING CRAFTS, SEAN MICHAEL  
13 KAVANAUGH, and "John Does", name fictitious,  
14 actual name and number of such persons  
15 being unknown,

Defendants.

-----X

14 The Plaintiff, Juan Carmona Morales, by their attorney, Leon  
15 Greenberg Professional Corporation, as and for a Complaint  
16 against the Defendants, state and allege, upon information and  
17 belief, as follows:

18 PARTIES, PROCEDURAL AND PRELIMINARY STATEMENT

19 1. This Court has jurisdiction over the claims presented on  
20 the First Claim for Relief herein pursuant to 19 U.S.C. §  
21 211-219, known as the Fair Labor Standards Act ("the FLSA"), and  
22 specifically under the provisions of 29 U.S.C. § 216(a).

23 2. This Court has jurisdiction over the Nevada State law  
24 claims presented in the Second, Third and Fourth Claims for  
25 Relief pursuant to 28 U.S.C. § 1367(a).

26 3. This case is properly venued before this Court pursuant  
27

1 to 28 U.S.C. Sec. 1391 (b).

2 4. The plaintiff Juan Carmona Morales (the "named  
3 plaintiff") is a resident of the State of Nevada and a former  
4 employee of one or more of the defendants. Upon information and  
5 belief, others similarly situated to said plaintiff are residents  
6 of the State of Nevada or other states and are current and former  
7 employees of defendants.

8 5. The defendants Allied Building Crafts, Inc., Gypsum  
9 Construction, Inc., Gypsum Construction West, Inc., Allied  
10 Construction Crafts, Inc. (collectively the "Corporate  
11 Defendants") are corporations incorporated in the States of  
12 Nevada or Arizona.

13 6. The defendant Sean Michael Cavanaugh (the "Individual  
14 Defendant") is a shareholder and/or director and/or officer  
15 and/or manager of one or more of the Corporate Defendants.

16 7. The defendants "JOHN DOES", name fictitious, actual name  
17 and number of such defendants being unknown, are natural persons  
18 that have committed the same or similar acts and/or omissions as  
19 the Individual Defendant and are united in interest with the  
20 Individual Defendant and/or one or more of the Corporate  
21 Defendants and/or otherwise have the same or similar status as  
22 the Individual Defendant as alleged herein in that said "John  
23 Does" are "employers" who are liable to the plaintiffs in a  
24 manner and for reasons that are the same or similar to that of  
25 the Individual Defendant and it is intended that such persons  
26 shall be properly identified and then named as party defendants  
27



1 in this case under their proper names at a future date.

2 STATEMENT OF FACTS

3 8. The named plaintiff is a former employee of one or more  
4 of the defendants.

5 9. The Individual Defendant, knowing full well that their  
6 actions were illegal, intentionally committed the various  
7 violations of State and Federal Law that are alleged herein.

8 10. The Individual Defendant was personally financially  
9 enriched to a very substantial extent from their illegal scheme  
10 to not pay the plaintiffs the full wages that they were owed.

11 11. The Individual Defendant exercised control over the  
12 employment of the plaintiffs in that such Individual Defendant  
13 specifically directed how the plaintiffs were to be paid by such  
14 Corporate Defendants and/or made decisions to not pay the  
15 plaintiffs the overtime pay, minimum wages, and other wages that  
16 are complained of herein, and it is further alleged that such  
17 conduct by such Individual Defendant has made such Individual  
18 Defendant an "employer" or a "person acting on behalf of an  
19 employer" within the meaning of the FLSA and the Laws of the  
20 State of Nevada and rendered such Individual Defendant personally  
21 liable to the plaintiffs for the claims made herein.

22 12. The defendants engage in for-profit businesses which  
23 have gross revenue in excess of \$500,000 per annum and are  
24 engaged in the production of goods for interstate commerce or  
25 the use or/for handling of goods which have moved in interstate  
26 commerce as such terms are defined in the FLSA and all other laws  
27

1 subject to the jurisdiction of the FLSA.

2 13. The plaintiffs have been employees of the defendants  
3 during the time period pertinent to this complaint, to wit,  
4 during a portion of the four years immediately preceding the  
5 initiation of this action. The plaintiffs have performed labor  
6 and services in various occupations that are subject to the  
7 aforesaid provisions of the FLSA. These occupations include,  
8 but are not limited to, hourly labor in defendant's retail store  
9 business.

10 14. That all of the various violations of law which are  
11 alleged herein were committed intentionally and/or willfully by  
12 the defendants.

#### 13 THE PROPOSED CLASS CLAIMS AND PARTIES

14 15. There are numerous persons who are similarly situated  
15 to the named plaintiff in respect to the named plaintiff's claims  
16 under Nevada law, in that such similarly situated persons, like  
17 the named plaintiff performed substantial work, labor and  
18 services for the defendants and did not receive the compensation  
19 required by the various Nevada Statutes alleged herein and their  
20 contracts of employment and as detailed hereafter. Such  
21 circumstances warrant the granting of class certification in each  
22 state law claims of the plaintiffs pursuant to F.R.C.P. Rule 23.

23 16. That the persons similarly situated to the named  
24 plaintiff and described in paragraph 15 constitute a class of  
25 persons that are so numerous that joinder of all such persons  
26 individually is impractical, such class consisting of all similarly  
27

1 wage earners or the defendants who were injured by the  
2 defendants' violations of Nevada's statutes, and defendants'  
3 breach of contract, that are detailed herein.

4 17. There are questions of law and fact common to the  
5 plaintiff class that predominates over any questions affecting  
6 only individual members of the plaintiff class, specifically  
7 whether the defendants have any legal obligation to the class  
8 members under Nevada law and if so what is the extent of such  
9 obligation.

10 18. The claims of the named plaintiff are typical of the  
11 claims of the above described plaintiff class, in that the  
12 interests of the named plaintiff is co-extensive with the  
13 interests of the other members of the plaintiff class, there is a  
14 lack of adverse interests between the named plaintiff and the  
15 other members of the plaintiff class, and common questions of law  
16 and fact exist as to the claims of the named plaintiff and the  
17 claims of the members of the plaintiff class.

18 19. The named plaintiff will fairly and adequately protect  
19 the interests of the plaintiff class and serve as an adequate  
20 representative plaintiff on behalf of the plaintiff class.

21 20. A class action pursuant to F.R.C.P. Rule 23 is  
22 superior to other available methods for the fair and efficient  
23 adjudication of the plaintiff class members' claims under Nevada  
24 law.

1 AS AND FOR A FIRST CLAIM FOR RELIEF  
2 ON BEHALF OF PLAINTIFF JUAN CARMONA MORALES AND  
3 ALL OTHER PERSONS WHO CHOOSE TO FILE A WRITTEN CONSENT  
4 TO JOIN THIS ACTION AS A PLAINTIFF PURSUANT TO  
5 29 U.S.C. § 216(b) OF THE FAIR LABOR STANDARDS ACT

6 21. Plaintiffs repeat and reiterate each and every  
7 allegation previously made herein.

8 22. The plaintiff Juan Carmona Morales brings this First  
9 Claim for Relief pursuant to 29 U.S.C. § 216(b) on behalf of  
10 himself and all other similarly situated persons who consent in  
11 writing to join this action as plaintiffs pursuant to 29 U.S.C. §  
12 216(b), and upon information and belief there are numerous such  
13 similarly situated persons.

14 23. Pursuant to the applicable provisions of the FLSA,  
15 including but not limited to 29 U.S.C. § 206 and § 207,  
16 plaintiffs were entitled to a minimum wage and an overtime hourly  
17 wage of time and one-half their regular hourly wage for all hours  
18 worked in excess of forty hours per week, the defendants were the  
19 employers or jointly liable co-employers of the plaintiffs, the  
20 plaintiffs worked more than 40 hours per week for the defendants,  
21 and defendants willfully failed to make said overtime and/or  
22 minimum wage payments.

23 24. The named plaintiff on behalf of himself and all other  
24 similarly situated plaintiffs who consent in writing to join this  
25 action, seeks, on this First Cause of Action, a judgment against  
26 defendants for unpaid overtime wages and/or minimum wages, such  
27 sums to be determined based upon an accounting of the hours  
worked by, and wages actually paid to, such plaintiffs, and also

1 seeks an award of liquidated damages, attorney's fees, interest  
2 and costs as provided for by the FLSA.

3           AN AND FOR A SECOND CLAIM FOR RELIEF ON  
4           BEHALF OF PLAINTIFF JUAN CARMONA MORALES  
5           AND ALL PERSONS SIMILARLY SITUATED  
6           PURSUANT TO NEVADA'S LABOR LAW

7           25. Plaintiffs repeat and reiterate each and every  
8 allegation previously made herein.

9           26. The named plaintiff brings this Second Claim for relief  
10 pursuant to NRS § 608.016 and NRS § 608.100 for payment of their  
11 full earned wages, NRS § 608.250, for non-payment of minimum  
12 wages, and NRS § 608.019, for payment of unpaid rest periods, on  
13 behalf of himself and the proposed plaintiff class members  
14 against the defendants.

15           27. Pursuant to NRS § 608.016, NRS § 608.100 and NRS §  
16 608.250 the plaintiffs were entitled to an hourly minimum wage  
17 and were also entitled to the full payment of their earned wages  
18 and the wages they were promised under their contracts of  
19 employment, the defendants were the employers or jointly liable  
20 co-employers of the plaintiffs, the plaintiffs worked certain  
21 hours for which they received no compensation whatsoever, meaning  
22 they were not paid a minimum wage as required by Nevada law for  
23 such hours of work and were not paid their full promised wages  
24 for such hours of work, certain plaintiffs also, on occasion,  
25 being required by the defendants to incur certain expenses for  
26 supplies and/or services used by the defendants solely for the  
27 benefit of the defendants in the defendants' business, such  
expenses not being reimbursed by the defendants and constituting

1 an unlawful rebate of the plaintiffs' wages in violation of NRS §  
2 608.100.

3 28. Pursuant to NRS § 608.019 the plaintiffs were entitled  
4 to paid rest time equal to 10 minutes for every 4 hours of work  
5 or major fraction thereof each day and the defendants failed to  
6 provide the paid rest time required by such statute.

7 29. The named plaintiff on behalf of himself and the  
8 proposed plaintiff class members, seeks, on this Second Claim for  
9 Relief, a judgment against defendants for unpaid wages and/or  
10 minimum wages and unpaid rest time, such sums to be determined  
11 based upon an accounting of the hours worked by, and wages  
12 actually paid to, the plaintiffs, and also seeks an award of  
13 attorney's fees, interest and costs, as provided for by Nevada  
14 Law.

15 AS AND FOR A THIRD CLAIM FOR RELIEF ON  
16 BEHALF OF PLAINTIFF JUAN CARMONA MORALES  
17 AND ALL PERSONS SIMILARLY SITUATED  
18 UNDER NEVADA LAW FOR BREACH OF CONTRACT

19 30. Plaintiffs repeat and reiterate each and every  
20 allegation previously made herein.

21 31. The named plaintiff brings this third claim for relief  
22 for breach of contract under Nevada law.

23 32. The plaintiff, Juan Carmona Morales, and those  
24 similarly situated to him, all had contracts of employment with  
25 the defendants whereby the defendants agreed to pay such  
26 plaintiffs a certain set hourly wage for each hour that they  
27 worked.

33. The defendants breached their contracts with the

plaintiffs by failing to pay such promised hourly wages,  
specifically by failing to pay the plaintiffs anything whatsoever  
for certain hours of work that they performed and also by  
requiring certain plaintiffs to incur certain expenses for  
supplies and/or services used by the defendants solely for the  
benefit of the defendants in the defendants' business, such  
expenses not being reimbursed by the defendants.

34. The named plaintiff on behalf of himself and the  
proposed plaintiff class members, seeks, on this Third Claim for  
Relief, a judgment against defendants for the unpaid wages owed  
to the named plaintiff and the plaintiff class members as a  
result of the defendants' breach of their contracts with the  
named plaintiff and the plaintiff class members, and also seeks  
an award of attorney's fees, interest and costs, as provided for  
by Nevada Law.

AS AND FOR A FOURTH CLAIM FOR RELIEF ON  
BEHALF OF PLAINTIFF JUAN CARMONA MORALES  
AND ALL PERSONS SIMILARLY SITUATED  
AGAINST THE INDIVIDUAL DEFENDANT UNDER  
NEVADA LAW FOR DAMAGES ARISING FROM  
THE INDIVIDUAL DEFENDANT'S TORTIOUS CONDUCT

35. Plaintiffs repeat and reiterate each and every  
allegation previously made herein.

36. The named plaintiff brings this fourth claim for relief  
on behalf of himself and all other similarly situated persons  
against the Individual Defendant in response to the Individual  
Defendant's tortious conduct.

37. The Individual Defendant, either personally or through  
their agents or employees, owed a fiduciary duty to the



1 plaintiffs to have such plaintiffs paid the amounts of money due  
2 to them pursuant to their contracts of employment with the  
3 defendants.

4 38. The Individual Defendant personally and maliciously  
5 acted to interfere with the plaintiffs' aforesaid contracts of  
6 employment with the defendants and tortiously induced a breach of  
7 such contracts in that such Individual Defendant, through their  
8 control and management of the Corporate Defendants made the  
9 Corporate Defendants breach their contracts with the plaintiffs  
10 by not paying such plaintiffs the monies owed to them under their  
11 contracts of employment with the Corporate Defendants, such  
12 actions by the Individual Defendant not being otherwise  
13 privileged.

14 39. The named plaintiff on behalf of himself and the  
15 proposed plaintiff class members, seeks, on this Fourth Claim for  
16 Relief, a judgment against the Individual Defendant for  
17 compensatory damages in an amount to be determined, upon  
18 information and belief such amount being in excess of Ten  
19 Thousand Dollars (\$10,000.00) or in such amount as may be  
20 determined to be appropriate at the time of trial, along with an  
21 award of punitive damages in the amount of Three Hundred Thousand  
22 Dollars (\$300,000.00) against the Individual Defendant or such  
23 other amount of punitive damages as is allowable under Nevada  
24 Revised Statutes § 42.005, along with interest, costs and  
25 attorney's fees.


26 WHEREFORE, plaintiffs demand the relief on each cause of  
27

1 action as alleged aforesaid, together with costs, interest,  
2 attorney's fees and such other relief as the Court deems just.

3 Plaintiffs demand a trial by jury on all issues so triable.

4 Dated: Clark County, Nevada  
5 October 1, 2004

6  
7 Yours, etc.,

8   
9 Leon Greenberg, Esq.  
LEON GREENBERG PROFESSIONAL CORPORATION  
Attorney for the Plaintiff  
10 633 South 4<sup>th</sup> Street - Suite 9  
Las Vegas, Nevada 89101  
11 (703) 383-6085  
Nevada Bar Number: 8094  
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Leon Greenberg, Esq.  
Leon Greenberg Professional Corporation  
Attorney for Plaintiff  
633 South 4<sup>th</sup> Street - Suite 9  
Las Vegas, Nevada 89101  
(702)383-6085  
Fax: (702)385-1827  
Nevada Bar Number 8094

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

-----X Docket #: CV-S-04-1365-LRH-LRL  
JUAN CARMONA MORALES, Individually,  
and on behalf of all others similarly  
situated,  
Plaintiffs,

-against-

ALLIED BUILDING CRAFTS, INC., GYPSUM  
CONSTRUCTION, INC., GYPSUM CONSTRUCTION  
WEST, INC., ALLIED CONSTRUCTION CRAFTS,  
INC., S.W. BUILDING CRAFTS, SEAN MICHAEL  
CAVANAUGH, and "John Does", name fictitious,  
actual name and number of such persons  
being unknown,  
Defendants.

-----X  
CERTIFICATION OF JUAN CARMONA MORALES

State of Nevada  
County of Clark ss.:

Juan Carmona Morales, being duly sworn, deposes and states that:

1. I am the named plaintiff in this matter and offer this affidavit in connection with my attorney's request to circulate notice of the pendency of this lawsuit to other persons who are current or former employees of the defendants.

2. I was an employee doing construction work for one or more of the defendants from December of 1999 through January 28, 2004. During this time the defendants used a compensation system that failed to pay its employees for all hours that they worked. I and other workers for the defendants were paid by the hour and received checks showing the hours they were supposedly working

1 and their hourly rate. When I started working for defendants as  
2 a foreman I was told that I would be paid \$18.54 an hour. Other  
3 construction workers who were not foreman were paid \$8.00 or  
4 \$12.00 or \$14.00 an hour. All of the hourly workers were only  
5 paid for 40 hours of work each week and then forced to work extra  
6 hours without being paid anything whatsoever. This happened  
7 because the defendants would require that the wages paid for each  
8 job that was done not go over a fixed budget. When it took more  
9 hours of work to complete the job than were allowed by the budget  
10 the workers did not get paid anything for the extra hours that  
11 they worked. The other hourly workers and I all worked at least  
12 45 hours a week but were only paid for 40 hours of work per week.

13 3. I personally worked with a crew of seven additional  
14 workers and we all worked at least 45 hours a week but were only  
15 paid for 40 hours each week. I also spoke with many workers in  
16 other crews for the defendants and those workers also told me  
17 that they, as well, were not being paid for their extra hours  
18 that were "over budget" and that this was happening to them all  
19 the time. During the time I worked for the defendants they had  
20 approximately 400 or more workers who were working for them in  
21 the Las Vegas, Nevada, area.

22 4. The defendants also had a policy of sometimes working  
23 employees six days a week, for more than 40 hours a week, but  
24 only paying the employees for 40 hours of work for the week.  
25 Specifically, the defendants would require that employees work a  
26 sixth day, on Saturday, if there was a holiday the following  
27

1 week. The employer would then pay 8 hours for the holiday but nothing for the work being done on Saturday. We were told that we were not getting paid for working on Saturday, or getting any extra overtime pay for working six days during one week, because we were getting paid for a day off the following week.

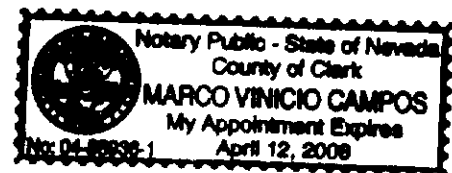
5. Certain other workers, including myself, were also forced to work additional hours that were not paid. For example, some workers were required to go to the defendants' office to get supplies and bring them to the job site. They were not paid for the extra time this involved. Some workers were also required to wait at job sites for inspectors and were not paid anything for the time, sometimes two hours or more, that they spent waiting.

Sworn to before me this  
4th Day of November 2004

*[Signature]*  
Notary Public

State of Nevada  
County of Clark ss.:

*[Signature]*  
Juan Carmona Morales

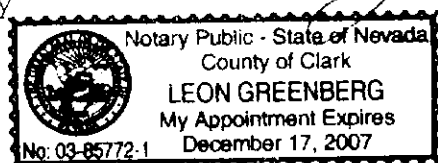


MARCO VINICIO CAMPOS, being duly sworn, deposes and states that:

On November 4<sup>th</sup> 2004, I translated verbally the above statement from English into Spanish and read it to Juan Carmona Morales as that person does not read English or speak English fluently. Juan Carmona Morales swore to me that the above statement was true and correct.

Sworn to before me this 4<sup>th</sup> day  
of November, 2004

*[Signature]*  
Notary



*[Signature]*  
Marco Vinicio Campos

TO BE DISTRIBUTED IN ENGLISH AND SPANISH

INSERT CAPTION OF CASE

NOTICE OF PENDENCY OF COLLECTIVE ACTION LAWSUIT  
THIS LAWSUIT SEEKS TO COLLECT MONEY THAT YOU MAY BE  
OWED FOR WORK YOU HAVE DONE BUT NOT BEEN PROPERLY PAID  
THE FULL WAGES REQUIRED BY LAW

TO: All persons currently or previously employed by  
ALLIED BUILDING CRAFTS, INC., GYPSUM CONSTRUCTION,  
INC., GYPSUM CONSTRUCTION WEST, INC., ALLIED  
CONSTRUCTION CRAFTS, INC., S.W. BUILDING CRAFTS  
(collectively referred to as "Gypsum") as construction  
workers and who were compensated on a hourly basis from  
anytime from [INSERT EARLIEST POSSIBLE DATE UNDER THREE  
YEAR STATUTE OF LIMITATIONS INCLUDING ANY TOLL IMPOSED  
BY THE COURT] to the present.

RE: Claim for unpaid overtime and liquidated under the  
Fair Labor Standards Act of 1938 (the "FLSA")

#### Introduction

You are receiving this Notice to let you know that  
this lawsuit is pending against Gypsum and seeks to  
collect unpaid overtime wages and liquidated (double)  
damages for certain work performed by its construction  
workers. It is claimed that hourly construction  
workers were improperly denied pay (they received no  
pay whatsoever) for certain hours of work that they  
performed that should have been paid on an overtime  
(time and one-half) basis. It is also claimed that  
such workers may have been paid for certain hours of  
work but not paid the proper overtime (time and one-  
half) rate of pay.

The purpose of this notice is to advise you about

this lawsuit and give you an opportunity to join this lawsuit and possibly recover unpaid overtime wages and additional liquidated damages (money) owed to you by Gypsum.

This Notice is not an expression by the Court of any opinion as to the merits of any claims or defenses asserted by any party to this action.

#### Description of the Lawsuit

On October 1, 2004, plaintiff Juan Carmona Morales brought this lawsuit against Gypsum. Specifically, the plaintiff claims he and other hourly construction workers employed by Gypsum were not properly paid overtime pay (one and one-half times their normal hourly rate) for all hours they worked over forty (40) hours per week. Plaintiff also seeks liquidated damages (double damages) in an amount equal to their unpaid overtime wages.

#### Composition of the Class

The plaintiff seeks, under the FLSA, to sue on behalf of themselves and all other similarly situated hourly construction worker employees of Gypsum who were not paid proper overtime wages.

#### Your Right To Participate In This Suit

If you fit the definition above, you may join this suit by mailing the "Consent To Become a Party Plaintiff" form to Plaintiffs' counsel at the following address:

INSERT MAILING ADDRESS

#### Effect Of Joining This Suit

If you choose to join in the suit, you will be bound by the decision of the court, whether it is favorable



or unfavorable.

The attorney for the class plaintiff is being paid on a contingency fee basis, which means that if there is no recovery there will be no attorneys' fee. If the plaintiffs prevail in this litigation, the attorney for the class will request that the Court either determine or approve the amount of attorney's fee and costs they are entitled to receive for their services.

If you return the consent form attached to this Notice, you are agreeing to: 1) designate the plaintiff as your agent to make decisions on your behalf concerning this lawsuit; 2) the method and manner of conducting this lawsuit; 3) the entering of an agreement with plaintiff's counsel concerning attorneys' fees and costs; and 4) all other matters pertaining to this lawsuit. These decisions and agreements made and entered into by the representative plaintiff will be binding on you if you join this lawsuit. However, the Court has retained jurisdiction to determine the reasonableness of any settlement with the defendants, and any agreement concerning the reasonableness of any attorney's fees and costs that are to be paid to the plaintiff's counsel.

#### Legal Effect In Not Joining This Suit

If you choose not to join in this suit, you will not be affected by any judgment or settlement rendered in this lawsuit, whether favorable or unfavorable to the class, meaning you will collect no money from the FLSA portion of this lawsuit and will not be prevented from bringing your own FLSA lawsuit. If you choose not to join in this lawsuit, you are free to file your own lawsuit under the FLSA, but you will then be responsible for all costs, including counsel fees, associated with your lawsuit.

#### Statute of Limitations on Potential Claims

The maximum period of time that you can collect unpaid overtime wages under the FLSA is three (3) years

from when you worked the hours, but were not paid, the unpaid overtime wages at issue. This statute of limitations continues to expire until you file a written consent to join this lawsuit with the Court or initiate your own lawsuit to collect such unpaid overtime wage. If you choose not to join this litigation by signing and returning a consent you may wish to promptly pursue litigation on your own to prevent the statute of limitations from adversely affecting your claim.

#### No Retaliation Permitted

Federal Law prohibits Gypsum from discharging you or in any other manner discriminating against you because you have exercised your rights under the FLSA to seek compensation.

#### Your Legal Representative If You Join

If you choose to join this lawsuit and agree to be represented by the named plaintiff through their attorney, your counsel in this action will be:

INSERT NAME AND ADDRESS

#### Further Information

Further information about this Notice and about this lawsuit may be obtained by contacting plaintiff's counsel: INSERT CONTACT INFORMATION

CONSENT TO JOIN PURSUANT TO 29 U.S.C. § 216(b)

TO: THE CLERK OF COURT AND TO EACH PARTY AND COUNSEL OF RECORD

1. I reside at \_\_\_\_ (Street) \_\_\_\_ (City) \_\_\_\_ (State) \_\_\_\_ (Zipcode)

2. My home telephone number is \_\_\_\_\_. (leave blank if you do not have a telephone).

3. My current email address (if any) is \_\_\_\_.

4. I understand that a lawsuit has been brought under the *Federal Fair Labor Standards Act*. I have read and I understand the notice accompanying this consent. I agree to be bound by any judgment of this Court in this lawsuit.

5. I understand and agree that I designate the named plaintiff as my agent and understand that I will be bound by the decisions and agreements made by and entered into by said plaintiff.

6. I understand that I will be represented by INSERT COUNSEL NAMES and that this Court has retained jurisdiction to determine the reasonableness of any settlement with the defendants and any agreement concerning the reasonableness of any attorneys, fees and costs that are to be paid to the plaintiff's counsel.

\_\_\_\_ (Signature)      \_\_\_\_ (Type or Print Name)

Leon Greenberg, Esq.  
Leon Greenberg Professional Corporation  
Attorney for Plaintiff  
633 South 4<sup>th</sup> Street - Suite 9  
Las Vegas, Nevada 89101  
(702)383-6085  
Fax: (702)385-1827  
Nevada Bar Number 8094

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

-----X Docket #: CV-S-04-1365-LRH-LRL  
JUAN CARMONA MORALES, Individually,  
and on behalf of all others similarly  
situated,  
Plaintiffs,

-against-

ALLIED BUILDING CRAFTS, INC., GYPSUM  
CONSTRUCTION, INC., GYPSUM CONSTRUCTION  
WEST, INC., ALLIED CONSTRUCTION CRAFTS,  
INC., S.W. BUILDING CRAFTS, SEAN MICHAEL  
CAVANAUGH, and "John Does", name fictitious,  
actual name and number of such persons  
being unknown,  
Defendants.

-----X  
ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

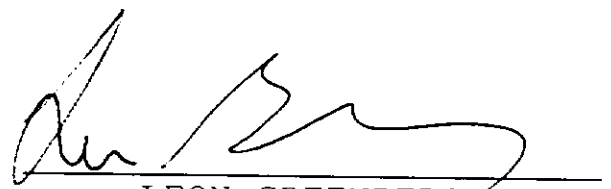
Leon Greenberg, an attorney duly licensed to practice law in the  
State of Nevada, and a member of the bar of this Court, hereby  
affirms, under the penalties of perjury, that:

On November 22, 2004 I served the within PLAINTIFF'S MOTION  
FOR CIRCULATION OF A NOTICE OF PENDENCY AND OTHER RELIEF by  
depositing a true copy thereof in a postage paid wrapper, first  
class mail, in an official depository under the exclusive care  
and custody of the United States Postal Service within the State  
of Nevada, addressed to each of the following persons at the last  
known address set forth after each name:

TO:

Little Mendelson  
Attorneys At Law  
3960 Howard Hughes Parkway - Suite 300  
Las Vegas, Nevada 89109-0920  
Attention: Rick D. Roskelley, Esq.

Clark County, Nevada  
Affirmed this 22ND day of nov. 2004

  
LEON GREENBERG  
Nevada Bar # 8094